

BEFORE THE
Communications C
WASHINGTON, D.C.

In the Matter of)
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)
Petition of the Embarras Local Operating Companies))
For Limited Forbearance Under 47 U.S.C. § 160(c)))
from Enforcement of Rule 69.5(a), 47 U.S.C. §))
251(b), and the Commission Orders on the ESP))
Exemption))
))

WC Dkt. No. 08-8

**COMMENTS OF TIME WARNER TELECOM, ONE COMMUNICATIONS AND
CBEYOND INC.**

Willkie Farr & Gallagher LLP
1875 K Street, N.W.
Washington, D.C. 20006
(202) 303-1000

ATTORNEYS FOR TIME WARNER
TELECOM INC., ONE
COMMUNICATIONS, AND CBeyond
INC.

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**COMMENTS OF TIME WARNER TELECOM, ONE COMMUNICATIONS AND
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Time Warner Telecom Inc. (“TWTC”), One Communications, and Cbeyond Inc., by their attorneys, hereby file these comments in opposition to the petition for forbearance of the Embarq Local Operating Companies (“Embarq”).¹ As explained below, Embarq’s petition is procedurally flawed, and it must be dismissed.

I. INTRODUCTION AND SUMMARY

In its petition, Embarq asserts that the FCC can and should ensure the application of interstate switched access charges to interexchange voice traffic that originates in IP format and terminates on the public switched telephone network (“IP-to-PSTN voice traffic”) through the targeted exercise of the agency’s forbearance powers under Section

¹ *Petition of the Embarq Local Operating Companies For Limited Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Rule 69.5(a), 47 U.S.C. § 251(b), and the Commission Orders on the ESP Exemption*, WC Dkt. No. 08-8 (filed Jan. 11, 2008) (“*Petition*”).

10. Regardless of whether this is an appropriate policy outcome, it cannot be achieved through the forbearance process.

First, a Commission decision not to enforce the rules and statutory requirements from which Embarq seeks forbearance (e.g., the exemption from access charges to enhanced/information service providers, the “ISP Exemption”²) would not, by itself, subject IP-to-PSTN traffic to access charges. Rather, the logical consequence of such forbearance would be the elimination of *any rate regulation* for IP-to-PSTN voice traffic. This is clearly not the outcome Embarq seeks and cannot be in the public interest.

Second, Section 10 only permits a carrier to seek forbearance from a rule or statutory requirement that applies to *the petitioning carrier*. In its petition, Embarq seeks forbearance from the ISP exemption. The ISP Exemption does not apply to Embarq when it functions as a carrier terminating IP-to-PSTN voice traffic over its PSTN switches. Instead, the ISP Exemption applies, by definition, to providers of unregulated information services. Embarq may not therefore seek forbearance from the ISP Exemption.

Third, Embarq’s concerns seem to center on entities that mask or improperly route interexchange IP voice traffic that terminates on PSTN switches, thus preventing LECs from identifying such traffic as subject to switched access charges. But the

² The FCC has concluded that the definitions of enhanced services and information services are almost identical. *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, ¶ 102 (1996), *subsequent history omitted*. The exemption from access charges for these kinds of services was established prior to the addition of the definition of information services in the Communications Act. The exemption has therefore traditionally been referred to as the Enhanced Service Provider Exemption or “ESP Exemption.” For purposes of simplicity, however, the exemption from applying access charges to enhanced and information services is referred to herein as the ISP Exemption.

elimination of the ISP Exemption will not prevent unscrupulous carriers from misrouting or masking traffic in this manner. Forbearance cannot therefore fix the public policy problem for which Embarq seeks redress.

II. ARGUMENT

A. Forbearance From The Rules Specified By Embarq Will Not Achieve Its Goal Of Subjecting Interexchange IP-to-PSTN Voice Traffic To Access Charges

In its petition, Embarq asserts that the Commission can and should use its forbearance powers to eliminate any uncertainty as to whether interstate switched access charges apply to interexchange IP-to-PSTN voice traffic. Embarq argues that forbearance from certain enumerated rules and statutory requirements would ensure that all interexchange IP voice traffic is subject to terminating access charges just like other interexchange voice traffic. But this is simply not the case.

For example, Embarq argues that the FCC should forbear from enforcing Section 69.5(a) of the Commission's rules "where any service provider might claim that IP-to-PSTN traffic qualifies it for treatment as an end user, rather than paying appropriate access charges under section 69.5(b)." *Petition* at 17. But forbearance from Section 69.5(a) with respect to IP-to-PSTN voice traffic will not subject such traffic to terminating access charges. Rather, if Embarq prevailed and was able to obtain forbearance from Section 69.5(a) for the traffic at issue, that traffic would likely be subject to *no inter-carrier compensation regulation at all*; an outcome which Embarq clearly did not intend and which is not in the public interest.

The ISP Exemption is currently implicitly codified in the Commission's rules through the interaction of Sections 69.2(m) and 69.5(a).³ Section 69.2(m) defines "end user" to include any customer of telecommunications service other than a carrier.⁴ Because ISPs are not carriers,⁵ the definition of end-user definition sweeps in ISPs. Section 69.5(a) applies end user charges on end users. *See* 47 C.F.R. § 69.5(a). By contrast, only entities defined as interexchange carriers must pay switched access charges (referred to in the rules as "carrier's carrier charges") pursuant to Section 69.5(b).⁶ The FCC explicitly declined to define ISPs as IXC's or to impose switched access charges on ISPs in its most recent order upholding the ISP Exemption. This was so because "it is not

³ *See Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, Order, 3 FCC Rcd 2631, n.8 (1988) ("Under our present rules, enhanced service providers are treated as end users for purposes of applying access charges. *See* 47.C.F.R. § 69.2(m)...Therefore, enhanced service providers generally pay local business rates and interstate subscriber line charges for their switched access connections to local exchange company central offices. Enhanced service providers also pay special access surcharges for private lines under the conditions set out in our rules. *See* 47 C.F.R. § 69.5(a) and (c).").

⁴ *See* 47 C.F.R. § 69.2(m) ("End user' means any customer of an interstate or foreign telecommunications service that is not a carrier except that a carrier other than a telephone company shall be deemed to be an "end user" when such carrier uses a telecommunications service for administrative purposes and a person or entity that offers telecommunications services exclusively as a reseller shall be deemed to be an 'end user' if all resale transmissions offered by such reseller originate on the premises of such reseller.").

⁵ Of course, a provider of traditional long distance voice services may also provide information services. When the IXC ISP is acting in its capacity as an ISP, it qualifies for the ISP Exemption. *See Northwestern Bell Telephone Company Petition for a Declaratory Ruling*, Memorandum Opinion and Order, 2 FCC Rcd 5986 ¶ 18 (1987).

⁶ *See* 47 C.F.R. § 69.5(b) ("Carrier's carrier charges shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services.").

clear that ISPs use the public switched network in a manner analogous to IXCs.”⁷ Thus, the ISP Exemption, as codified in Sections 69.2(m) and 69.5(a), remains good law.

Forbearance from Section 69.5(a) would not subject ISP traffic to Section 69.5(b). Holding that IP-to-PSTN traffic is no longer subject to Section 69.5(a) would mean that providers of such services are not treated as end users for purposes of interstate access charges. But such forbearance would not mean that providers of IP-to-PSTN service would be subject to interstate switched access charges. Those charges apply only “interexchange carriers” under Section 69.5(b). Providers of IP-to-PSTN service are not currently classified as interexchange carriers. Such providers’ traffic would not therefore automatically become subject to switched access charges under Section 69.5(b). The only way to establish such a classification is for the Commission to affirmatively adopt it in rulemaking or a declaratory ruling. Forbearance from enforcing Section 69.5(a), by itself, will not achieve this outcome.⁸

Embarq also seeks forbearance from Section 251(b)(5) for IP-to-PSTN voice traffic. But forbearance from Section 251(b)(5) would not result in the application of interstate switched access charges to IP-to-PSTN traffic.

The FCC has concluded that traffic that is subject to the ISP Exemption is governed by Section 251(g), pursuant to which the FCC regulates “information access”

⁷ *Access Charge Reform et al.*, First Report and Order, 12 FCC Rcd 15982, ¶ 345 (1997), *subsequent history omitted* (“Access Charge Order”).

⁸ Embarq seems to believe that the ISP exemption does not currently apply to IP-to-PSTN traffic. *See, e.g., Petition* at 18 (“The system includes a limited exemption for ESPs, but it was never extended to IP-to-PSTN voice calls.”). This may be the case and Embarq is free to file a petition for declaratory ruling to clarify the matter. However, it has not done so here, and the FCC may not make such a finding in response to a petition for forbearance.

traffic. The FCC currently treats Sections 251(b)(5) and 251(g) as mutually exclusive.⁹ In other words, traffic covered by one section is not covered by the other. Therefore, forbearance from Section 251(b)(5) with respect IP-to-PSTN voice traffic would not affect termination rates for IP-to-PSTN voice traffic. If subject to the ISP Exemption, the traffic at issue is already subject to Section 251(g) and that would continue to be the case after forbearance from Section 251(b)(5).

It is worth pointing out that, if the FCC were in the future to rule that Section 251(b)(5) applies to all classes of traffic,¹⁰ including IP-to-PSTN voice traffic, then forbearance from Section 251(b)(5) and Section 69.5(a) in this proceeding would mean that IP-to-PSTN traffic would be subject to *no rate regulation*. Section 251(g) only remains in effect until it is superseded by an affirmative Commission rule, and subjecting all traffic to Section 251(b)(5) would constitute such an act.¹¹ But if ISP traffic were subject to a prior forbearance order prohibiting application of Section 251(b)(5) to that traffic, ISP traffic would end up subject to neither end-user charges pursuant to Section

⁹ *Petition of Core Communications, Inc. for Forbearance from Sections 251(g) and 254(g) of the Communications Act and Implementing Rules*, Memorandum Opinion and Order, 22 FCC Rcd 14188, n.54 (2007) (“The Commission previously determined [in the *ISP Remand Order*] that ‘section 251(g) serves as a limitation on the scope of ‘telecommunications’ embraced by section 251(b)(5).’”) (footnote omitted); *See also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 ¶ 34 (2001) (“We conclude that a reasonable reading of the statute is that Congress intended to exclude the traffic listed in subsection (g) from the reciprocal compensation requirements of subsection (b)(5).”).

¹⁰ Many parties, including TWTC, have urged that the FCC regulate the transport and termination of all interstate traffic under Section 251(b)(5). *See e.g.*, TWTC Comments, CC Dkt. No. 01-92 (filed May 23, 2005).

¹¹ *See* 47 U.S.C. § 251(g) (holding that the pre-1996 Act access regime shall remain in place “until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment.”).

69.5(a), nor reciprocal compensation pursuant to 251(b)(5), nor access charges pursuant to Section 251(g) or Section 69.5(b). Such a regulatory vacuum is not in the public interest.

The Commission has appropriately rejected petitions for forbearance where only an affirmative rule change would provide the relief that the petitioner sought. For example, Fones4All sought forbearance “from applying the rules [47 C.F.R. § 51.319(d)] restricting the availability of ULS [unbundled local circuit switching]”.¹² The FCC rejected Fones4All’s petition because forbearance from Section 51.319(d) “would not give the petitioner the relief it seeks.” *Fones4All Order* ¶ 7. This was so because “there is no ‘default unbundling obligation.’ Rather, Sections 251(c)(3) and 251(d)(2) require an affirmative Commission decision to require unbundling.” *Id.* ¶ 8. Accordingly, the Commission concluded that “forbearing from section 51.319(d) of the Commission’s rules results in a void rather than an unbundled local circuit switching requirement.” *Id.* ¶ 7. Similarly, as explained above, the FCC must change its rules to affirmatively subject ISPs to access charges to the extent that they do not already apply. As with the Fones4All petition, forbearance here would result in a regulatory “void.” For this reason alone, the Commission should reject the Embarq petition.

B. The Terms Of Section 10 Preclude Embarq From Obtaining The Relief It Seeks

Embarq’s petition for forbearance is also defective because the Act only permits carriers to seek forbearance from rules that apply to *such petitioning carriers*. Under

¹² *Fones4All Corp. Petition for Expedited Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 from Application of Rule 51.319(d) to Competitive Local Exchange Carriers Using Unbundled Local Switching to Provide Single Line Residential Service to End Users Eligible for State or Federal Lifeline Service*, Memorandum Opinion and Order, 21 FCC Rcd 11125, ¶ 3 (2006) (“*Fones4All Order*”).

Section 10(c) only “[a] telecommunications carrier, or class of telecommunications carriers, may submit a petition to the Commission requesting that the Commission exercise the authority granted under this section with respect to *that carrier or those carriers*, or any service offered by *that carrier or carriers*.” (emphasis added). 47 U.S.C. § 160(c). Embarq may not seek forbearance from the ISP exemption because the exemption does not apply to Embarq or any other carrier.

Indeed, in the 1997 *Access Charge Order*, the Commission made clear that the ISP exemption is not a regulatory burden placed on *telecommunications carriers* from which carriers may seek forbearance, but rather a rule that applies to non-carrier ISP traffic. The Commission emphasized that “*ISPs* should not be subject to interstate access charges.” *Access Charge Order* ¶ 345 (emphasis added). Similarly, Embarq does not describe the ISP exemption as a constraint on its actions, but rather as an alleged right of ISPs.¹³ Moreover, Section 69.5(a), from which Embarq seeks forbearance does not apply to Embarq itself, but rather imposes an obligation on “public end users,” a category which, under the current rules, includes ISPs. In sum, because the ISP Exemption is a right that applies to traffic transmitted by a non-telecommunications carrier, Embarq cannot seek forbearance from that exemption pursuant to Section 10.

C. Embarq’s True Concern Is Preventing Traffic Misrouting, Which Cannot be Addressed By Eliminating The ISP Exemption

Finally, despite Embarq’s focus on the ISP Exemption, its core concern seems to be with traffic masking and misrouting. That is, Embarq alleges that interexchange VoIP

¹³ See e.g., *Petition* at vi (“Section 10(a)(1) is met, because enforcing the ISP exemption, to the extent it may be claimed to apply to IP-originated phone-to-phone voice traffic that terminates on the PSTN, is not necessary to ensure that charges or practices are just and reasonable, and not unjustly or unreasonably discriminatory.”).

traffic is often inappropriately terminated over local trunks.¹⁴ Because of this misrouting, Embarq rates the traffic pursuant to reciprocal compensation rather than access charges. Similar misrouting was employed by AT&T with respect to the traffic at issue in the so-called “IP-in-the-middle” proceeding.¹⁵ But even an affirmative ruling that the ISP Exemption does not apply to interexchange IP-to-PSTN voice traffic will have no effect on the ability of unscrupulous VoIP providers and their interexchange partners to mask and misroute traffic. Moreover, as explained, eliminating the ISP Exemption would yield a regulatory “void” in which no intercarrier compensation rules would clearly apply to IP-to-PSTN voice traffic. Such a confusing situation would create just as many opportunities for unscrupulous actors to claim that their actions were not prohibited as is the case today.

This is not to say that Embarq is without any recourse. The FCC is considering whether to require VoIP providers to pass calling party information (“CPN”) to carriers with which they exchange traffic.¹⁶ If the terminating LEC received that information, it

¹⁴ See *id.* at 20 (“Non-local IP-to-PSTN voice traffic is increasingly being routed over local interconnection trunks to avoid terminating access. As a result of this regulatory arbitrage, ILECs are improperly denied access revenues for terminating competitors non-local voice calls.”); *id.* at 5 (“[N]on-local IP-to-PSTN traffic cannot lawfully be routed through local interconnection trunks for the purpose of reciprocal compensation under section 251(b)(5) of the Act.”).

¹⁵ See *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, 19 FCC Rcd 7457 ¶ 11 & n.48 (2004) (“To get the call to the called party’s LEC, AT&T changes the traffic back from IP format and terminates the call to the LEC’s switch through local business lines, rather than through Feature Group D trunks. Therefore, AT&T does not pay terminating interstate access charges on these calls...AT&T pays the lower local business line rate for terminating calls in this manner, as opposed to paying the higher terminating access charge rate that would apply to traffic terminated over feature group D trunks.”).

¹⁶ See *id.* ¶ 20 (“Several commenters argue that it is difficult to determine which calls utilize IP technology for purposes of assessing access charges. Other commenters argue

could, in many cases at least, properly rate the call even if the call were improperly terminated over local business lines instead of Feature Group D trunks. If combined with an affirmative ruling that interstate access charges apply to the termination of IP-to-PSTN voice traffic, Embarq would achieve its desired objective. Embarq may seek this result in the *IP-Enabled Services* proceeding, but it cannot achieve it through a petition for forbearance.

III. CONCLUSION

For the foregoing reasons, Embarq's petition should be denied.

Respectfully submitted,

/s/
Thomas Jones
Jonathan Lechter
Willkie Farr & Gallagher LLP
1875 K Street, N.W.
Washington, D.C. 20006
(202) 303-1000

ATTORNEYS FOR TIME WARNER
TELECOM INC, CBeyond INC. AND
ONE COMMUNICATIONS CORP.

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that the Commission should impose a minimum surcharge for any IP traffic that cannot be measured and should require all providers of telecommunications services that utilize the SS7 network to pass calling party number information to identify where the call originated. The Commission has recognized the potential difficulty in determining the jurisdictional nature of IP telephony. We intend to address this issue in our comprehensive *IP-Enabled Services* rulemaking proceeding and do not address it here.”).